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Monday, August 14, 2006

Charters and judicial review

There is a long-standing controversy about the idea of parliamentary supremacy -- the idea that legislative law trumps all other law. That is currently the dominant theory in England, but the United States holds a contrary view -- here judges review legislative laws against a prior and higher law: a written constitution (and perhaps also against natural law, but that is a subject we won't pursue here).

Parliamentary supremacy was not always the view in England. Sir Edward Coke, for example, considered some old statutes and case precedents part of a higher "common law" that could on occasion trump statute. Coke's doctrine was not overtly repudiated by English legal courts for several hundred years, but neither was it strictly followed by later judges. Parliamentary supremacy was a major legal issue in the American Revolution which separated the United States from England.

One of the problems with the modern debate over this issue is that the question is put in modern terms that assume that statute and case law where on point must always be followed --the modern rigid view of written law. But this was, if out of practical necessity if for no other reason, not the medieval view of the law. Books (or, more often, scrolls) of statutes and case records were often locked in dusty libraries where students and barristers and attorneys and even judges had difficulty gaining access to them. Sometimes they had simply been destroyed. As a result, prior to the 16th century printed editions, much of the learning about the law came from oral instruction rather than books. It was gestalt in nature. This rendered it, by our standards,very flexible but also disconcertingly uncertain. Not only did judges sometimes forget statutes and cases; they could often also effectively just ignore statute or case precedent if they felt it didn't lead to a just outcome in the case at hand. The legal historian Theodore Plucknett, for example, recorded several medieval cases where statutory law was clearly on point but ignored. Judges thus could effectively nullify statutory law, which is even more powerful than the ability to review statutes against a higher law. Records of cases prior to the 16th only rarely cite either statutes or prior cases, but simply declare what the interlocutor believes the law to be.

Another crucial point is that up to the 16th century in England (and even, at least nominally, somewhat later) parliamentary statute was consideredto be an opinion about what the law was, not a statement of new law. The same held true for case precedent (and nominally still does even up to today). Of course, in reality law was always evolving, and statutes might indeed radically change things. But this ancient attitude towards the law was plausible at the time, again due to the primarily oral nature of the law, and it had legal consequences. It meant, first of all, that the modern "last-in-time rule" (when two statutes conflict, the later statute has effectively repealed the earlier one) was not in force -- a later statute could be reviewed equally against an earlier statute and the judge could decide which version most suited the case. Thus the earlier statute was neither a higher law (as in modern judicial review against a constitution), nor a lower law (as in the modern "last-in-time" rule) but merely another opinion about the law to be weighed against

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the more recent opinion. The more recent or more ancient statute might weigh more heavily depending on which was considered more authoritative Secondly, the fact that statutes were merely an opinion about the law, not the law itself, gave a judge justification to ignore them when they felt they were not very authoritative, which for the practical reasons cited above they often did. If you couldn't remember the law but had to look it up (which before printed editions could involve quite a bit of trouble), it probably was not so authoritative. Third, it meant that there could be two leading theories about judicial review against case law:

(1) Parliamentary statutes trump cases from the Kings Bench, Chancery, and other courts because Parliament is the highest court in the land.

(2) Parliamentary statutes are simply dicta (since they typically did not involve a specific case and controversy brought to trial), and therefore take lower priority than case precedent.

I'm not aware of any participant in this debate expressing the second theory, but some might have thought it implied, as I do. The first theory has often been cited as the leading argument for parliamentary supremacy, but not much before Blackstone made it popular in the late 18th century.

Sir Edward Coke, the leading opponent of Parliamentary supremacy, (and whose opinion in Dr. Bonham's case is perhaps the only unequivocal precedent against such supremacy), muddled the issue by often quoting at least one old statute, the Magna Carta, as a law that trumped later statute. Coke effectively treated the Magna Carta as the United States treats our Constitution. In the habits of the time, he simply weighed its authority very highly. An argument for Coke's view is that Magna Carta took the form of a property grant that effected the entire property of the realm (including all incorporeal rights, such as what we call civil liberties), and that it was a charter for England itself analogous to the charters the king was granting for early American colonies at the time, which trumped the statutes of the resulting colonial legislatures.

But Coke also considered certain long-standing procedural doctrines derived from case precedent, such as the right to a properly trained judge, to be part of the higher law against which statutes should be reviewd. He did not consider most everyday aspects of what we now call the common law (the law of real property, tort, etc.) to be part of this higher common law that trumped statute. Rather, the higher common law was confined to certain important procedural rights, similar in style to those later found in the United States Bill of Rights.

Americans had a stronger case for judicial review. First, our (mostly corporate) colonial governments were franchises expressly set up by charter. The power of colonial legislatures was thus not unlimited, but rather was constrained by clauses in the charter. Colonial legislators could not, for example, deny the king his right to customs, and could not contravene the English liberties of residents, since these rights were both expressly reserved in the charter grants. So judicial review became the American habit from the start. Second, these charters were printed, thus immediately available to the judge and all parties; this and the fact that they were a higher law than local legislative statute helped them to be applied, using the modern view of written law, and a strict way. (The extent to which Parliamentary statute applied to the colonies, beyond the extent to which Parliament could regulate the king's customs and military affairs, and whether Parliamentary statutes could themselves be reviewed, per Coke, and against what,were far more controversial issues, and played a leading role in the Revolution). As a practical matter, Americans also got in the habit of conducting judicial review of statutes, and thus in contrast to English judges acquired much practical experience at the task. Judicial review of statutes is not something one immediately learns to do once one thinks of the idea, and if one has not learned how to do it properly, it's easy to imagine why one would be opposed to the idea.

Update, Sept. 14th 2006: Todd Zywicki has made similar points about case law, precedent, and the doctrine of *stare decisis* in his paper "The Rise and Fall of of Efficiency in Common Law: A Supply Side Analysis," available at SSRN. Before the printing press, and to some extent for several centuries thereafter, case precedent was very hard to access through other than oral communications and was considered more or less authorattive according to a variety of factors rather than followed rigidly. Thus *stare decisis,* the modern

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doctrine that courts must follow precedent, was not rigidly adhered to. I'd also add something that Zywicki's account and my own research experience with medieval cases implies, namely that the the idea of "overturning" a case was unknown. A contradictory older case could always be treated as more authoratitive than the more recent case, or vice versa, in parallel with the lack of a "last-in-time" rule for statute law.

Posted by Nick Szabo at 11:56 AM

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